

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2149

To be argued by
DIANA GARFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2149

WILLIAM T. McNELLIS,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-2149

WILLIAM T. McNELLIS,
APPELLANT

V.

U. S. A. ,
APPELLEE

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale _____, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn, New York

That on the 21st day of March, 1978 _____, deponent served the within Brief and Appendix
upon William T. McNellis, Box PMB 96844-131, U.S. Penitentiary, Atlanta, Ga. 30315

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensale

This 21st day of March, 1978

PATRICIA D. O'HARA, Notary Public
State of New York No. 31-4654007
Qualified in New York County
Cert. Filed in Kings County
Commission Expires March 30, 1979

Patricia D. O'Hara

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BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from a judgment of the District Court (Zampano, J.) denying McNellis' petition pursuant to 28 U.S.C. § 2255.

McNellis, tried and convicted of armed bank robbery, was sentenced to a term of imprisonment of nineteen years. The judgment of conviction was summarily affirmed by this Court on April 18, 1974, 493 F.2d 1399, and *certiorari* was denied by the Supreme Court on October 15, 1974, 419 U.S. 850.

McNellis' most recent § 2255 petition alleges that the government's key witness at his trial committed perjury in regard to the benefits he received from the government, and that the government was aware of the deception. On September 20, 1977, Judge Zampano denied McNellis'

motion without an evidentiary hearing. McNellis' motion to reconsider was denied on October 27, 1977. Notice of appeal was filed on November 2, 1977.

Questions Presented

Whether the District Court was required to conduct an evidentiary hearing where a prior District Court proceeding had resolved the only issue of fact adversely to appellant.

Statement of Facts

William McNellis and a co-defendant Robert Millette were indicted on December 13, 1972 for violations of 18 U.S.C. 2113(a), (b), and (d), in connection with the armed robbery of a bank in Waterford, Connecticut. On October 26, 1973, both defendants were convicted by a jury on all counts, and on December 18, 1973, McNellis was sentenced to a nineteen year term of imprisonment by United States District Judge Robert C. Zampano.

A key government witness at trial was one Aedan McCarthy, an accomplice in the Waterford robbery, who on May 25, 1973, had pled guilty before United States District Judge Jon O. Newman to a violation of 18 U.S.C. 2113(b) in connection with an unrelated bank robbery. That plea was a result of negotiations with the government calling for McCarthy's testimony in the McNellis trial. On September 4, 1973, Judge Newman sentenced McCarthy to a ten year term of imprisonment, which sentence McCarthy was serving during McNellis' trial.

During the McNellis trial, McCarthy testified at great length on direct and cross-examination about his accommodations with the government and state authorities, the latter aspect of which is not at issue in the case at bar. McCarthy stated essentially that he had been allowed

to plead to the ten year count for his robbery, that he had received the full ten year sentence, and that he had received no promises with respect to additional help on that sentence.

Subsequent to the McNellis trial, McCarthy filed a *pro se* petition for habeas corpus relief, Civil Number N-74-95, alleging that, prior to the McNellis trial, he had been advised by FBI agents that he would actually serve very little of his ten year sentence. Counsel was appointed, and an amended writ amplifying his claims was filed on November 22, 1974.

Judge Newman held an evidentiary hearing on these claims on December 17, 1974, during which testimony was taken from McCarthy, the FBI agent alleged to have made promises to McCarthy, and the Assistant United States Attorney who prosecuted the McNellis case. The range of benefits extended to McCarthy was fully explored, after which Judge Newman found that McCarthy's claims were implausible and incredible, an "after the fact" expansion of his agreement with the government. He then denied the petition for these reasons.

McNellis thereafter filed the instant petition pursuant to 28 U.S.C. § 2255 alleging that the government had knowingly allowed McCarthy to give perjured testimony in the McNellis trial, *i.e.*, that no promises had been made to McCarthy with respect to help on his ten year sentence. Judge Zampano denied the motion without evidentiary hearing, reasoning that the files and records of the McCarthy and McNellis proceedings conclusively demonstrated that "[a]ny claim that McCarthy was extended more consideration than that revealed on the record before this Court and before Judge Newman must be deemed patently frivolous. The petitioner's affidavit lacks any credible evidence that McCarthy was promised more benefits than those testified to at petitioner's trial." This appeal followed.

ARGUMENT

The District Court was not required to conduct an evidentiary hearing where a prior District Court proceeding had resolved the only issue of fact adversely to appellant.

McNellis argues that the District Court erred in denying his Section 2255 petition without conducting an evidentiary hearing.

Title 28, United States Code, Section 2255 provides that "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall hold an evidentiary hearing to make findings of fact and conclusions of law. The statute further provides, however, that the court may determine the motion without requiring production of the prisoner.

In *Machibroda v. United States*, 368 U.S. 487 (1962), the Supreme Court held that where detailed and specific factual allegations contained in a prisoner's § 2255 motion and affidavit related primarily to occurrences outside the courtroom, the records and files of the case could not conclusively determine the issues raised. The Court noted, however, that

"[t]he language of the statute does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner."

Machibroda v. United States, *supra*, 368 U.S. at 495.

This Court has applied these principles to require a hearing where the movant has raised detailed and controverted issues of fact which "he or she is in a position to establish by competent evidence." *Newfield v. United*

States, 565 F.2d 203, 207 (2d Cir. 1977); *Dalli v. United States*, 491 F.2d 758 (2d Cir. 1974).

The instant case is unusual in that the "detailed facts" which McNellis alleges in his petition derive from *McCarthy's* petition for habeas corpus relief, which involved *McCarthy's* negotiations with federal officials. McNellis claims that *McCarthy's* allegations and testimony at the evidentiary hearing in the habeas action establish that *McCarthy* committed perjury at McNellis' trial, which fact was known to the government. In resolving *McCarthy's* habeas petition, Judge Newman, after hearing testimony from the witnesses involved, concluded that *McCarthy's* allegations and testimony were both implausible and incredible, an "after the fact" expansion of the agreement reached. In effect, Judge Newman, who was very well aware of the intricacies of the plea arrangement from his thorough colloquy with *McCarthy* and his counsel at the change of plea and sentencing proceedings, totally discredited those very allegations which McNellis depends upon as the "factual" basis of his petition. *United States v. Franzese*, 525 F.2d 27 (2d Cir. 1975).

Given this sequence of events, Judge Zampano properly considered the records and files of the *McCarthy* proceedings as well as the records and files of the McNellis proceedings in denying McNellis' petition without a hearing. The two proceedings are so closely related as to be effectively one case, since *McCarthy's* testimony in the McNellis trial resulted from the negotiated plea agreement. McNellis' petition alleges no detailed issues of fact which he "is in a position to establish by competent evidence," *Newfield v. United States*, *supra*, 565 F.2d at 207. Rather, the factual issues raised involved the nature of *McCarthy's* plea bargain, and any controverted issues related thereto had been resolved in the government's favor by Judge Newman. Viewing the totality of the records and files, Judge Zampano properly denied McNellis' petition without hearing.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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